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Federal Communications Commission
Office of Secretary

March 2, 2005

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
c/o Natek, Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002
Phone: (202) 418-0300

via hand delivery

RE: American Cable Association ("ACA"); Petition for Rulemaking to Amend 47 CFR §§ 76.64, 76.93 and 76.103

Dear Ms. Dortch:

On behalf of ACA, we submit this Petition for Rulemaking to Amend 47 CFR §§ 76.64, 76.93 and 76.103. We include an original and nine copies for filing and distribution to the Chairman and Commissioners.

If you have any questions, please call Chris Cinnamon or me at 312-372-3930.

Sincerely,

Emily A. Denney

Enclosure

cc: Matthew M. Polka
Christopher C. Cinnamon

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MB 05-19

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
	)	
Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103	))	MB Docket No. __
	)	
Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity	)))	

American Cable Association

PETITION FOR RULEMAKING

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March 2, 2005

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SUMMARY

The American Cable Association ("ACA") asks the Commission to adjust the broadcast exclusivity and retransmission consent regulations to reflect marketplace changes for broadcasters, consumers, and small cable companies.

In essence, the problem is this: In the upcoming retransmission consent election period, network broadcasters will require small cable companies to pay unprecedented fees as a condition of receiving retransmission consent. For consumers served by the small cable sector, broadcaster cash demands threaten to add more than $860 million to the cost of basic cable. Currently, the "pricing" of retransmission consent does not occur in a competitive market. To the contrary, powerful broadcasters demand a "price" for retransmission consent while at the same time blocking access to readily available lower cost substitutes.

The broadcasters do so by two means: (i) the broadcast exclusivity regulations -- network nonduplication and syndicated exclusivity; and (ii) contracts between affiliates and networks that restrict a station's ability to grant retransmission consent. The current environment for retransmission consent "pricing" represents the antithesis of a competitive market. The disparity in market power between smaller cable companies and broadcast groups makes smaller providers and their customers especially vulnerable.

Competition and consumers are harmed when broadcasters use exclusivity and network affiliate agreements to extract supracompetitive "prices" for retransmission consent from small cable companies. To address the problem, ACA proposes adjustments to Commission regulations that will achieve the following results:

- Maintain broadcast exclusivity for stations that elect must carry or that do not seek additional consideration for retransmission consent.

- Eliminate exclusivity when a broadcaster elects retransmission consent and seeks additional consideration for carriage by a small cable company.

- Prohibit any party, including a network, from preventing a broadcast station from granting retransmission consent to a small cable company.

We also want to be clear what this Petition is not requesting:

- ACA does not request a prohibition on additional cash payments or other consideration for retransmission consent. We only request that for small cable companies, market forces help determine the "price."

- ACA does not seek at this time "wholesale change" for the broadcast television industry or the network/affiliate structure. The changes proposed here will not affect 93% of television households.

- ACA does not ask for widespread importation of distant signals. To the contrary, ACA members prefer to carry local network stations. We only ask for an unfettered market to determine the "price."

As set forth in the Petition, the requested changes align completely with the policies and precedent underlying broadcast exclusivity and retransmission consent. The adjustments will restore a measure of market discipline to the "price" of retransmission consent for small cable companies, thereby ensuring more choice and lower costs for consumers.

The policies underlying the broadcast exclusivity and good faith retransmission consent negotiation regulations support the changes requested by ACA.

Section II of this Petition reviews the history of the broadcast exclusivity and retransmission consent regulations.

Concerning broadcast exclusivity, the Commission has consistently articulated the following policies:

- The fundamental purpose of broadcast exclusivity is to protect ad-supported local broadcasters from harmful competition by cable systems.
- As market conditions change, the Commission will revise or rescind the exclusivity regulations.
- Absent harmful competition, competitive markets work better than regulated exclusivity in promoting the public interest.
- Broadcast exclusivity is not intended as a tool for broadcasters to increase revenue.

Today, market conditions have eliminated any harmful competitive threat to network broadcasters from small cable companies. At the same time, powerful network owners and affiliate groups are using exclusivity solely to prop up the "price" of retransmission consent. In these cases, <u>regulated exclusivity must give way to market pricing</u>.

The history of the retransmission consent regulations points in the same direction. The express language of Section 325(b) applies to <u>all</u> commercial broadcast stations – local and distant alike. Likewise, the requirement that a broadcaster negotiate in good faith applies to <u>all</u> negotiations, both in-market and out-of-market. Yet, when dealing with smaller cable companies, broadcasters refuse to negotiate retransmission consent because of contracts between networks and affiliates that prohibit out-of-market retransmission consent.

This conduct violates the Commission's objective standards of good faith. In adopting these regulations, the Commission intended to provide "concise, clear" standards where the proscribed conduct would "constitute a violation of the good faith standard in *all* possible instances."

Nothing exempts network affiliate agreements from these regulations. Nowhere do the regulations contain an "out-of-DMA" exception. Still, this is precisely the conduct that small cable companies face as powerful broadcasters demand a "price" for retransmission consent.

Current market conditions warrant the rulemaking requested here.

The Commission has made clear that broadcast exclusivity is "not sacrosanct." Ample evidence exists that changed market conditions require the adjustments proposed here. Section III reviews the substantial evidence of fundamental changes affecting broadcasters and small cable companies. Three sets of changes are particularly germane.

- Ad-revenue supported commercial broadcasting has become a mature, financially robust industry.
- Consolidation in the broadcast industry and the "must have" nature of network programming has eliminated any competitive threat to network broadcasters from small cable companies.
- Broadcasters are targeting the small cable sector with unprecedented cash demands. Absent relief, consumers served by small cable companies face more than $860 million added to the cost of basic cable in the upcoming retransmission consent round.

Recent examples involving small cable companies show that market forces result in more efficient "pricing" of retransmission consent.

As a matter of economic theory, there should be no controversy that the availability of substitutes results in efficient pricing of a good. Conversely, when the law or a seller erects barriers preventing access to substitutes, the seller can price the good above what a competitive market would bear. The "pricing" of retransmission consent for network stations is no different.

The Commission need not rely solely on economic theory to evaluate the changes proposed here. Section IV discusses two recent examples that show how well the market for retransmission consent works when artificial barriers are eliminated. In short, when a broadcaster seeking a "price" for retransmission consent faces competition, the price comes down. The examples also show how, when dealing with small cable companies, powerful broadcasters and networks will go to great lengths to prevent market pricing of retransmission consent. This is why the Commission must act.

The amendments proposed by ACA will remove artificial barriers to marketplace "pricing" of retransmission consent for small cable companies.

ACA asks the Commission to adjust three sections of Part 76 to remove artificial barriers to market "pricing" of retransmission consent for small cable companies. These changes will establish the following mechanism: In cases where a broadcaster seeks additional consideration for retransmission consent from a small cable company, neither that broadcaster nor any other party can prevent the small cable company from obtaining retransmission consent and carrying an alternative source of network programming. As discussed in Section V:

- The changes will benefit consumers served by smaller cable companies by increasing choices and lowering costs.
- The changes will preserve exclusivity for those stations that need it.
- The changes will not harm network broadcasters.
- The changes are limited to small cable companies, which serve only 6% of U.S. television households.

In short, we request this: When a broadcaster seeks a "price" for retransmission consent, a small cable company has the ability to "shop" for lower cost network programming for its customers. When artificial barriers to alternative sources of network programming are removed, the marketplace will work to "price" retransmission consent.

Before the
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In the matter of	)	
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Petition for Rulemaking to Amend	)	
47 C.F.R. §§ 76.64, 76.93, and 76.103	)	MB Docket No. __
	)	
Retransmission Consent, Cable	)	
Network Non-Duplication,	)	
and Syndicated Exclusivity	)	

American Cable Association

PETITION FOR RULEMAKING

I. INTRODUCTION

The American Cable Association ("ACA") asks the Commission to adjust the broadcast exclusivity and retransmission consent regulations to reflect marketplace changes for broadcasters, consumers, and smaller cable companies.

In essence, the problem is this: In the upcoming retransmission consent round, broadcasters will require small cable companies to pay unprecedented fees as a condition of receiving retransmission consent. For consumers served by the small cable sector, broadcaster cash demands threaten to add more than $860 million to the cost of basic cable. Currently, the "pricing" of retransmission consent does not occur in a competitive market. To the contrary, broadcasters demand a "price" for retransmission consent while at the same time blocking access to readily available lower cost alternatives.

The broadcasters do so by two means: (i) use of broadcast exclusivity -- network nonduplication and syndicated exclusivity; and (ii) express restrictions in network affiliate agreements that prohibit stations from entering into out-of-market retransmission consent agreements.

The current environment for retransmission consent "pricing" represents the antithesis of a competitive market. The disparity in market power between smaller cable companies and broadcast groups makes smaller providers and their customers especially vulnerable.

Competition and consumers are harmed when broadcasters use exclusivity and network affiliate agreements to extract supracompetitive "prices" for retransmission consent from small cable companies. To address this problem, ACA proposes adjustments to Commission regulations that will achieve the following results:

- Maintain the broadcast exclusivity regulations for stations that elect must carry or that do not seek additional consideration for retransmission consent.
- Eliminate broadcast exclusivity when a broadcaster elects retransmission consent and seeks additional consideration for carriage by a small cable company.
- Prohibit any party, including a network owner, from preventing a broadcast station from negotiating retransmission consent with a small cable company.

Exhibit A contains the text of ACA's proposed changes to 47 C.F.R. §§ 76.64, 76.93, and 76.103.

At the outset, we want to be very clear what this Petition is <u>not</u> requesting:

- ACA does <u>not</u> request at this time a prohibition on additional cash payments[1] or other consideration for retransmission consent. We only request that for small cable companies, market forces help determine the "price."
- ACA does <u>not</u> seek at this time "wholesale change" to the broadcast television industry or the network/affiliate structure. The changes proposed here will <u>not</u> effect negotiations for carriage of broadcast signals to 93% of U.S. television households. The changes are proposed for small cable companies, which serve approximately 7% of U.S. television households.
- ACA does <u>not</u> ask at this time for elimination of broadcast exclusivity. We only request that when a broadcaster seeks a "price" for retransmission consent, a small cable company has the ability to "shop" for lower cost network programming for its customers.
- ACA does not ask for wholesale importation of distant signals. To the contrary, ACA members prefer to carry local network stations. When an in-market station requests cash for carriage, we only ask for an unfettered market to determine the "price."

As set forth in this Petition, ACA's requested changes align completely with the policies and precedent underlying the Commission's broadcast exclusivity and retransmission consent regulations. The adjustments will restore a measure of market discipline to the "price" of retransmission consent for small cable companies, thereby ensuring more choice and lower costs for consumers. At the same time, the proposed changes will maintain exclusivity for those stations that desire it. In short, when a station chooses to set a "price" for retransmission consent, artificial barriers to alternatives for small cable companies are removed. Efficient "pricing" of retransmission consent will result.

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[1] Through the cable compulsory copyright license, each small cable company already pays for each broadcast signal carried. 17 U.S.C. § 111.

The American Cable Association. ACA represents nearly 1,100 independent cable companies that serve more than 8 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states, and in virtually every congressional district. The companies range from family-run cable businesses serving a single town to multiple system operators that focus on serving smaller markets. More than half of ACA's members serve fewer than 1,000 subscribers. All ACA members face the challenges of upgrading and operating broadband networks in lower-density markets. All ACA members and their customers face higher costs for basic cable service because of the retransmission consent practices of network owners and affiliate groups. ACA has standing to bring this Petition on behalf of its members.[2]

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[2] *See* 47 C.F.R. § 1.401(a). ACA has filed numerous items with the Commission demonstrating how the retransmission consent practices of networks and affiliate groups harm ACA members. *See, e.g., Inquiry Concerning A La Carte, Themed Tier Programming and Pricing, Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207, Comments of the American Cable Association (filed 12, 2004); *In re Consolidated Application of General Motors Corporation, Hughes Electronic Corporation, and The News Corporation, For Consent to Transfer Control,* MB Docket No. 03-124, Comments of the American Cable Association (filed June 16, 2003) and Reply Comments of the American Cable Association (filed July 1, 2003); *Petition for Inquiry into Retransmission Consent Practices,* American Cable Association, Proceeding PRM02MB (filed October 1, 2002) ("ACA Petition for Inquiry") and *Petition for Inquiry into Retransmission Consent Practices First Supplement* (filed December 9, 2002) ("ACA Petition for Inquiry Supplement").

II. BACKGROUND – A BRIEF HISTORY OF THE BROADCAST EXCLUSIVITY AND GOOD FAITH NEGOTIATION REGULATIONS.

This Petition addresses two sets of regulations – the broadcast exclusivity regulations and the retransmission consent good faith negotiation regulations. Generally, the broadcast exclusivity regulations entitle a station to require cable systems to block network and syndicated programming carried on channels that originate from outside a station's protected zone.[3] The Commission promulgated these regulations to protect the audience of advertising-supported local broadcast stations. When dealing with small cable companies, broadcasters now use these regulations to artificially elevate the "price" of retransmission consent.

The exclusivity regulations do <u>not</u> apply outside a local broadcast station's protected zone. In these areas, broadcasters employ a different technique to block alternatives and raise the "price" of retransmission consent. Outside of protected zones, broadcasters and networks use contracts to block cable carriage of alternative network stations. The contracts prohibit a broadcaster from granting retransmission consent to a cable system outside of a DMA. This practice conflicts with the express language of the good faith negotiation regulations.[4] Still, networks and affiliates rely on these provisions to refuse to negotiate retransmission consent.

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[3] 47 C.F.R. §§ 76.92 – 76.95 (network nonduplication); 47 C.F.R. §§ 76.101 – 76.110 (syndicated exclusivity).

[4] 47 C.F.R. § 76.65(b)(1)(i) and (vi):

> The following actions or practices violate a broadcast television station's duty to negotiate retransmission consent agreements in good faith: (i) Refusal by a television broadcast station to negotiate retransmission consent with any [MVPD] . . . (vi) Execution by a television broadcast station of an agreement with any

The broadcast exclusivity and good faith negotiation regulations were promulgated to serve far different policy goals than helping networks and affiliate groups to extract higher retransmission consent "prices" from small cable companies. A brief review of the history of these regulations will underscore the need to make the adjustments requested in this Petition.

A. Broadcast exclusivity -- protecting ad-supported local broadcasters from "harmful" cable competition.

The broadcast exclusivity regulations have a 40-year history at the Commission. During this period, the Commission has repeatedly adjusted the regulations as market conditions changed. Today, market conditions warrant "tweaking" the regulations again. A review of Commission orders shows that the changes requested by ACA align precisely with the intent and purpose of the regulations.

1965 and 1966 – The initial non-duplication regulations.

The Commission first promulgated network non-duplication regulations for microwave-fed cable systems in 1965,[5] then expanded those regulations to all cable systems in 1966.[6] These orders contain detailed discussions of the rationale for limited

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> party, a term or condition of which, requires that such television broadcast station not enter into a retransmission consent agreement with any [MVPD].

[5] *In the Matter of Amendment of Subpart L, Part 11, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave States to Relay Television Signals to Community Antenna Systems;* Docket Nos. 14895 and 15233, *First Report and Order,* 38 FCC 683 (1965) ("*1965 Cable Carriage Order*").

[6] *In the Matter of Amendment of Subpart L, Part 91, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems; Amendment of Parts 21, 74, and 91 to Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems, and Related Matters;* Docket Nos. 14895, 15233, and 15971, *Second Report and Order,* 2 FCC 2d. 725 (1966) ("*1966 Cable Carriage Order*"), ¶¶ 19, 46.

broadcast exclusivity. Key policy themes articulated in these orders surface repeatedly in subsequent orders and are germane to the changes proposed here.

In adopting the first network nonduplication regulations, the Commission described one overriding policy concern – protecting broadcasters from unfair competition from cable systems. The Commission feared that cable systems would use distant signals to block or impede access to local signals as a competitive strategy, thereby hurting the growth of network broadcasting.[7] On this point, the Commission said:

> In light of the unequal footing on which broadcasters and CATV systems now stand with respect to the market for program product, we cannot regard a CATV system's duplication of local programming via the signals of distant stations as a fair method of competition.[8]
>
> * * *
>
> Because it is inconsistent with the concept of CATV as a supplementary service, because we consider it an unreasonable restriction upon the local station's ability to compete, and because it is patently destructive of the goals we seek in allocating television channels to different areas and communities, we believe that a CATV system's failure to carry the signal of a local station is inherently contrary to the public interest.[9]
>
> * * *
>
> The new [network nonduplication] rules discussed below are the minimum measures we believe to be essential to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth of television broadcast service.[10]

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[7] *1966 Cable Carriage Order*, ¶ 26 (citing *1965 Cable Carriage Order*, ¶ 57).

[8] *1966 Cable Carriage Order*, ¶ 27 (citing *1995 Cable Carriage Order*, ¶ 57).

[9] *1966 Cable Carriage Order*, ¶ 26 (citing *1965 Cable Carriage Order*, ¶ 57).

[10] *1966 Cable Carriage Order*, ¶ 47.

As these statements show, the initial broadcast exclusivity regulations were driven by the specter of cable systems using distant signals to choke stations' economic lifeblood – audience share and advertising revenue.

The early orders also make clear that the Commission would reevaluate the regulations as market conditions change:

> We do not regard the patterns of exclusivity created in the existing system for the distribution of television programs as sacrosanct. [11]
>
> * * *
>
> [U]nless we were convinced that the impact of CATV competition upon broadcasting service would be negligible, we would favor some restrictions upon the ability of CATV systems to duplicate the programs of local broadcasting systems, as a partial equalization of the conditions under which CATV and broadcasting service compete.[12]

From these statements, it follows that if market conditions developed to where the impact on broadcasters of competition from cable companies was negligible, then the fundamental rationale for exclusivity would disappear.

When considering small cable companies today, this has happened. Market conditions have eliminated any harmful competitive threat from small cable companies. As discussed below, by withdrawing network stations, it is now broadcasters that threaten the survival of small cable companies.

Another important policy theme raised in 1966 applies with equal force today – the disruption and inconvenience to consumers when a cable operator loses access to network programming. For that reason, in 1966, the network nonduplication rules did not apply where a local signal was not carried.

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[11] *1966 Cable Carriage Order*, ¶ 27 (citing *1965 Cable Carriage Order*, ¶ 57).

[12] *Id.*

> If nonduplication were afforded where the local station is not carried, the CATV subscriber would, in some instances, be greatly inconvenienced and, much more important, in others be deprived of all opportunity to view the programs involved. This is not the purpose or effect of the rules as written, nor would it serve the public interest.[13]

For small cable companies today, when broadcasters seek a "price" for retransmission consent, broadcasters block access to other sources of network programming precisely to threaten disruption and inconvenience to cable consumers, all to gain leverage to extract a higher retransmission consent price.

1972 – Broadcast exclusivity expanded to syndicated programming.

Six years later, the Commission established exclusivity for syndicated programming.[14] This action coincided with the expansion of independent stations in the new UHF band, and the Commission sought to protect those stations for the same reasons it first adopted network nonduplication for network stations.

> The additional program exclusivity rules are designed both to protect local broadcasters and to insure the continued supply of television programming.[15]
>
> * * *
>
> Our basic objective is to get cable moving so that the public may receive its benefits, and to do so without jeopardizing the basic structure of over-the-air television.[16]

---

[13] *1966 Cable Carriage Order*, ¶ 64 (citations omitted).

[14] *In the Matter of Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, Cable Television Report and Order*, 36 FCC 2d. 141 (1972) ("*1972 Syndex Order*").

[15] *Id.* ¶ 73.

[16] *Id.* ¶ 58.

At the same time, the Commission reiterated the need to reevaluate the regulations as market conditions change.

> [T]he Commission retains full freedom and, indeed, the responsibility to act as future developments warrant.... [A]s we gain experience and insight, we retain the flexibility to act accordingly--to make revisions, major or minor--and to keep pace with the future of this dynamic area of communications technology.[17]

As discussed in Section III, substantial marketplace changes, including broadcasters' use of market power to raise the "price" of retransmission consent, justify the changes requested here.

1980 – Syndex regulations eliminated due to changed market conditions.

Eight years after broadening the scope of exclusivity to include syndicated programming, the Commission rescinded the regulations.[18] The Commission studied market conditions and concluded that eliminating syndicated exclusivity would benefit consumers and competition, while having a minimal effect on local broadcast stations.[19]

In the *1980 Syndex Order,* the Commission articulated policy statements that remain important today. In particular, the Commission emphasized that broadcast exclusivity only existed to advance the public interest in free over-the-air television and program diversity, <u>not</u> to enrich corporate owners of broadcast licenses.

> [O]ur system of broadcasting places significant weight on the value of 'localism' and on the understanding that broadcast station licensees are public trustees that must serve the 'public interest, convenience, and

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[17] *1972 Syndex Order* at ¶ 66.

[18] *In the Matter of Cable Television Syndicated Program Exclusivity Rules*; *Inquiry into the Economic Relationship between Television Broadcasting and Cable Television*, Dockets No. 20988 and 21284, *Report and Order*, 79 FCC.2d 663 (1980) ("*1980 Syndex Order*").

[19] *Id.* ¶ 4.

> necessity' even if, in particular circumstances, that does not comport with their own immediate economic interests.[20]
>
> * * *
>
> Because competition is the general requirement, the Commission is not to be concerned with the effects of competition on station revenues or profits. It must be concerned, however, if there is evidence that competition is so destructive or debilitating that it results in a loss of broadcast service to the public.[21]
>
> * * *
>
> We strongly emphasized . . . as we have on previous occasions that the Commission's underlying concern in the regulation of both broadcasting and cable television is 'with the quantity and quality of video and telecommunications service that the public receives' and not, as some might erroneously perceive, 'with shifting or safeguarding revenues or profits, or with the success or failure of any particular firm, industry, or technology.'[22]

In short, the Commission concluded that absent evidence of "harmful" competition, a competitive market advanced the public interest better than regulated exclusivity.

As discussed below, in today's marketplace there is no risk of harmful competition from small cable companies to network stations. Contrary to Commission policy, when small cable companies are involved, the exclusivity regulations are being used solely to advance the "immediate economic interests" of the owners of broadcast licenses. This practice harms the public interest in competition, diversity, and lower costs for consumers.

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[20] *1980 Syndex Order* at ¶ 6 (citations omitted).

[21] *Id.* ¶ 7 (emphasis added).

[22] *Id.* ¶ 21 (citations omitted).

1988 – Syndex regulations return due to fears of harmful cable competition.

Eight years later, the Commission reimposed the syndicated exclusivity rules.[23] The Commission again pointed to the threat of cable operators refusing to carry broadcast stations as an unfair competitive strategy. "[I]n the absence of must carry rules, the ability to obtain exclusive rights to programming may be an important tool in winning cable carriage."[24] The Commission further stated:

> In fulfilling our responsibility under Sections 301, 307(b), and 309, we believe the public interest requires that free, local, over-the-air broadcasting be given full opportunity to meet its public interest obligations. An essential element of this responsibility is to create a local television market that allows local broadcasters to compete fully and fairly with other marketplace participants.[25]

As indicated, a main factor in the Commission's analysis was the lack of must carry regulations and the resultant competitive disadvantage for broadcasters. The 1992 Cable Act fixed that.

The *1988 Syndex Order* also reiterated an important policy theme from previous orders – broadcast exclusivity served to advance the public interest, not to fatten broadcasters' and networks' bottom lines.

> Our analysis suggested that because the network programming material is identical, the rules actually protect the local advertising and the public service announcements within and adjacent to network programming. <u>They do not, however, allow the network to increase its revenues; nor was this their intent.</u>[26]

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[23] *In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries;* Gen. Docket No. 87-24, *Report and Order*, 3 FCC Rcd. 5299 (1988) ("*1988 Syndex Order*").

[24] *Id.* ¶ 63.

[25] *Id.* ¶ 74.

[26] *Id.* ¶ 110 (emphasis added).

Finally, the *1988 Syndex Order* made clear that when the threat of harmful competitive abated, the regulations should be changed. Sounding a policy theme that has become the hallmark of current Commission policy, the *1988 Syndex Order* stated, "Competition is generally far more reliable than regulation for fostering fair and efficient use of the means of mass communication."[27]

As described above, several consistent themes run throughout the Commission's orders on the broadcast exclusivity regulations. First, the regulations were promulgated to protect ad-supported broadcasters from unfair cable competition. Second, the regulations were never intended as a means to increase station or network profits. Finally, regulated exclusivity should give way to market forces when cable systems no longer present a threat of harmful competition. Today, when broadcast exclusivity is used to extract higher prices from small cable companies, each policy theme underscores the need for reform.

The history of the retransmission consent regulations points to the same conclusion.

B. Retransmission consent – establishing a marketplace for good faith negotiations for carriage of local *and* distant broadcast stations.

The retransmission consent regulations also have a substantial history before the Commission. A brief review of those regulations shows how the changes requested here align fully with the intent and purpose of Section 325(b) and the good faith negotiation regulations.

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[27] *1988 Syndex Order* at ¶ 51 (emphasis added).

Under Section 325(b), the marketplace for retransmission consent does not stop at a DMA boundary.

In enacting Section 325(b), Congress intended to create a marketplace for retransmission consent. "It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals. . ."[28] As this statement and the statute make clear, Congress did not limit the scope of retransmission consent to in-market negotiations. The express language of Section 325(b) applies to all commercial broadcast stations – local and distant alike.[29]

Likewise, the requirement that a broadcaster negotiate in good faith applies to all negotiations, both in-market and out-of-market. Neither the statute nor the Commission's regulations make any distinction on this point. In other areas, Congress readily distinguished between carriage of local and distant stations.[30] It did not do so for retransmission consent on cable systems.

In turning broadcast signal carriage over to marketplace negotiations, nowhere did Congress indicate that artificial barriers should constrain that marketplace. Yet, where small cable companies are concerned, broadcasters are "pricing" retransmission consent while at the same time blocking access to substitutes. This represents the antithesis of a competitive marketplace, directly contrary to Congress' intent.

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[28] Senate Committee on Commerce, Science, and Transportation, S.Rep. No. 92, 102d Cong., 1st Sess. (1991) at 36.

[29] 47 U.S.C. § 325(b) (2004) *amended by* PL 108-447 § 201, 118 Stat 2809, December 8, 2004.

[30] 17 U.S.C. § 111 (cable compulsory copyright license); 17 U.S.C. § 119 (DBS compulsory copyright license).

Good faith negotiation regulations – prohibiting agreements that restrict retransmission consent and refusals to negotiate.

With the Satellite Home Viewer Improvement Act of 1999, Congress established an obligation for broadcasters to negotiate retransmission consent in good faith.[31] The Commission established the good faith negotiation regulations in the *SHVIA Implementation Order*.[32] A review of key points from the order shows how the current practices of networks and affiliate groups squarely conflict with the letter and spirit of the regulations.

In implementing Section 325(b)(3)(C), the Commission established seven objective standards, and a subjective "totality of the circumstances" test.[33] In adopting the objective standards, the Commission intended to provide "concise, clear" standards where the proscribed conduct would "constitute a violation of the good faith standard in all possible instances."[34] Put another way, the Commission did not intend the standards to govern negotiations on one side of a DMA boundary and not the other. At issue here are two related objective standards – the prohibition on agreements preventing a broadcaster from granting retransmission consent and the prohibition on refusing to negotiate retransmission consent.[35]

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[31] Satellite Home Viewer Improvement Act of 1999, P.L. 106-113, Div. B, § 1000(a)(9), § 1009, 113 Stat. 1536, 1501A-521 (Nov. 29, 1999) ("SHVIA").

[32] *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity;* CS Docket No. 99-363, *First Report and Order*, 15 FCC Rcd. 5445, (2000) ("*SHVIA Implementation Order*").

[33] 47 C.F.R. § 76.65(b)(1), (2).

[34] *SHVIA Implementation Order*, ¶ 31 (emphasis added).

[35] 47 CFR § 76.65(b)(1)(i), (vi).

It is important to recall that supporters of these standards included broadcasters and networks.[36] The *SHVIA Implementation Order* states, "NBC proposes . . . that extrinsic evidence of an understanding with a third party that the negotiating party will not enter into a retransmission consent agreement, should also evidence violations of the good faith negotiation requirement."[37] NBC's statement is especially noteworthy. In a recent case before the Media Bureau, it came to light that NBC contractually prohibits affiliates from granting retransmission consent to cable operators outside a station's DMA, even if the signal can be received over-the-air.[38] This is exactly the type of "third party understanding" that NBC said should violate the good faith standards. As a result of these illegal affiliate agreement provisions, broadcasters refuse to negotiate, violating another fundamental objective standard of good faith negotiation.

The *SHVIA Implementation Order* addresses this conduct without equivocation:

> [A] broadcaster is prohibited from entering into an agreement with any party a condition of which is to deny retransmission consent to any MVPD. It is impossible for a broadcaster to engage in good faith negotiation with an MVPD regarding retransmission consent when it has a contractual obligation not to reach an agreement with that MVPD.[39]

Nothing exempts network affiliate agreements from this regulation. Nowhere do the regulations contain an "out-of-DMA" exception. Yet this is precisely the conduct that

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[36] *SHVIA Implementation Order*, ¶ 35.

[37] *Id.* (emphasis added).

[38] *Monroe, Georgia Water Light and Gas Commission d/b/a Monroe Utilities Network v. Morris Network, Inc., Owner of WMGT, Channel 41, Macon, Georgia, et al.*, CSR Nos. 6237-C and 6254-C, *Memorandum Opinion and Order*, 2004 WL 1661042 (rel. July 27, 2004) ("*Monroe Order*"), ¶¶ 4, 7; *Monroe Utilities Complaint* (filed Sept. 2, 2003) at 3, Exhibit A.

[39] *SHVIA Implementation Order*, ¶ 45 (emphasis added).